HUSSAINA RANI NAINA MOHAMED

v.

AHMAD NADZRI KAMARUDDIN & ANOR.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-531-95]
2 OCTOBER 1996

TORT: *Negligence - Motor accident - Burden of proof - No evidence as to how accident occured - No police evidence called - Whether claim must necessarily fail*

The appellant's husband died as a result of a fatal road accident in which he was knocked down by a bus driven by the first respondent. The appellant sued the respondents for negligence and appeared before the learned trial Judge as the sole witness. In her testimony the appellant described only the scene of the tragedy, but said nothing on how the accident came to take place. The learned trial Judge dismissed the appellant's claim, whereupon the appellant appealed.

Held:
Per Abdul Malik Ahmad JCA

[1] The onus of proving negligence on the part of the defendant is on the plaintiff. Where he fails to discharge it either by his own evidence or by cross examination of the defendant or by admission made by the defendant, his claim fails.

[2] An appellate tribunal should be slow in interfering with a finding of fact of the trial Court. In this case, the appellant in the Court below could not even tell how the accident occured and no police evidence was called. The respondent, on the other hand, had given evidence similar to the contents of his police report which did not at all indicate negligence on his part. This being the case, the trial Judge had not therefore acted in error.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***TORT:** Kecuaian - Kemalangan motor - Beban membukti - Tiada keterangan mengenai bagaimana kemalangan itu berlaku - Tiada keterangan polis dipanggil - Samada tuntutan seharusnya gagal*

Suami perayu telah meninggal dunia akibat kemalangan maut jalan raya, di mana beliau telah dilanggar oleh sebuah bas yang dipandu oleh responden pertama. Perayu telah mendakwa responden atas kecuaian dan telah hadir di hadapan Hakim yang bijaksana sebagai saksi tunggal. Dalam testimoninya, perayu telah menerangkan hanya keadaan tragedi tersebut, tetapi tidak menyatakan apa-apa mengenai bagaimanakah kemalangan itu telah berlaku. Hakim yang bijaksana telah menolak tuntutan perayu berikutan mana perayu telah merayu.

Diputuskan:
Oleh Abdul Malik Ahmad HMR

[1] Beban membuktikan kecuaian di pihak defendan adalah terletak pada plaintif. Di mana beliau gagal untuk membuktikan sama ada melalui keterangannya yang tersendiri atau melalui pemeriksaan balas defendan atau melalui pengakuan yang dibuat oleh defendan, maka tuntutannya gagal.

[2] Sesuatu tribunal rayuan harus bersikap teliti sebelum mencampuri keputusan fakta Mahkamah perbicaraan. Dalam kes ini, perayu dalam Mahkamah di bawah tidak dapat menceritakan bagaimana kemalangan itu telah berlaku dan keterangan polis telah tidak dipanggil. Responden, sebaliknya pula, telah memberikan keterangan yang serupa dengan kandungan laporan polisnya, yang mana tidak sama sekali menunjukkan kecuaian di pihaknya. Oleh kerana keadaannya sedemikian, Hakim perbicaraan, dengan itu, tidak bertindak secara salah.

[Rayuan ditolak.]

Cases referred to:
Neo Chan Eng v. Koh Yong Hoe [1960] 26 MLJ 291 ***(refd)***
Siti Aisha binti Ibrahim v. Goh Cheng Hwai [1982] 2 MLJ 124 ***(refd)***

[Appeal from High Court Malaya, Kuala Lumpur; No: S3-23-43-91]

For the appellant - R. Arunachalam; M/s. Arun & Co.
For the respondent - S. Suresh; M/s. R.K. Nathan & Co.

JUDGMENT

Abdul Malek Ahmad JCA:

Just after midnight on 11 September 1990, the first respondent was driving the second respondent's bus from Happy Garden towards the city when, at the 4½ milestone Jalan Klang Lama, he had knocked into a pedestrian crossing the road hereinafter ('the deceased').

The only evidence from the appellant, who is the widow of the deceased, was that the scene of the accident was a dual carriageway with a divider along the middle with a fence about three or four feet high with an opening through which pedestrians could pass through, quite often used since there was no sign to forbid them to do so. There were shops and a market on the left side of the road as one faces the city. The appellant was the sole witness but, apart from describing the scene of the tragedy, could not tell how the accident occurred.

The first respondent testified that he was driving in the inner lane between 40 to 50 kilometres per hour because there were vehicles parked in the outer lane. He saw two people running fast, one in front of the other, from the right hand side of the carriageway. He did not expect them, who appeared to be quarrelling, to cross the divider into his path but the person in front did so when the bus was 30 feet away whereupon he braked thereby reducing his speed to 25 kilometres per hour.

Thereafter, he had accelerated and when the bus was passing the opening at the divider, the second person had jumped over the fence on the divider and was knocked down by the bus. In cross examination, he clarified that he did not see the person jump over the fence but was certain that the person had fallen in front of the bus.

Learned Counsel for the appellant suggested through cross examination that after missing the first person who crossed, the first respondent had swerved his bus to the right and had run into the deceased who was standing on the divider. It must be emphasised here that there was no evidence to that effect and the first respondent's police report had actually supported his testimony.

In these circumstances, the learned trial Judge had dismissed the appellant's claim. Despite that, he had in his judgment discussed the quantum of damages the appellant should get if he was said to have erred on appeal but we see no necessity to deliberate on the quantum because we were in full agreement with him on the liability point and in fact, after hearing learned Counsel for the appellant, did not require a reply from learned Counsel for the respondent.

In *Neo Chan Eng v. Koh Yong Hoe* [1960] 26 MLJ 291 it was held:

> The onus of proving negligence on the part of the defendant is on the plaintiff. Where he fails to discharge it either by his own evidence or by cross-examination of the defendant or by admission made by the defendant his claim fails.

In *Siti Aisha binti Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124 the Federal Court ruled that:

> The question for determination by the learned President in this case was essentially one of fact. The finding of the trial Court should not have been disturbed as there was no valid reason to show that the trial Judge had not taken advantage of his having seen and heard the witnesses.

Apart from these two cases, there are numerous other authorities, too many to mention, which categorically state that an appellate tribunal should be slow in interfering with a finding of fact of the trial Court which had observed the demeanour and heard the witnesses before coming to its conclusion. In this particular appeal, the appellant in the Court below could not even tell how the accident took place and no police evidence was called. The respondent, on the other hand, had given evidence similar to the contents of his police report which did not at all indicate any negligence on his part. We could not, therefore, say that the trial Judge had acted in error here.

In consequence, we had dismissed the appeal with costs, affirmed the order of the learned trial Judge and ordered that the deposit is to go to the respondent to account of their taxed costs.

Reported by WA Sharif